and in the letter of 4th January, 1935 occur the words:

"Until further consideration my client is grateful for permission until 30th June next."

In *Norris* v. *Smith*, and *Mason* v. *Burkinhead*, similar conditional notices were held insufficient.

The preliminary objection therefore is good and the action must be dismissed with costs to be taxed under section 2(4) as between solicitor and client.

Action dismissed.

Solicitors: *Braddell Bros.; Drew & Napier.*

Re LEE KIM CHYE, deceased

[O.C.J. (Mills J.) November 22, 1935]

[Singapore Originating Motion No. 1 of 1935]

Ordinance No. 3 (Wills), s.13 — Revocation of will by marriage — Chinese secondary marriage.

If a Chinese marries a secondary wife after making his will such marriage revokes the will. When a ceremony is performed by Chinese on marrying a secondary wife such ceremony is strong evidence of intention to contract a permanent union. Recognition of the marriage by the husband's family is not an essential element of its validity.

Re Lee Choon Guan deceased, Lew Ah Lui v. *Choa Eng Wan & Ors.* [1935] M.L.J. 78, discussed.

ORIGINATING MOTION.

The plaintiff took out an originating motion for an order that the will of Lee Kim Chye, deceased had been revoked by his subsequent marriage with the plaintiff. The motion was served upon Chan Siew Choo, an executrix named in the will and issues were directed to be tried as to whether the applicant, Koh Gek Tiang (the plaintiff on the issues) was a lawful [61] widow of [61] Lee Kim Chye, deceased and whether she became a lawful wife subsequent to the making of his will dated the 15th March, 1923, and whether the said will was thereby revoked. Chan Siew Choo was the defendant on the issues. The issues so directed to be tried came on for hearing on the 26th March, the 8th and 9th days of July, the 25th September and the 23rd October, 1935.

John Laycock for the plaintiff on the issues.

Ordinance No. 3 (Wills), sections 13 and 14. A will is revoked by subsequent marriage. This statutory provision was taken from English Wills Act but that Act was merely statutory recognition of old law. *Holdsworth's* History of English Law, Vol. 3, 1922 Edition, p. 540. *Williams* on Executors, 10th Edition, p. 138 and 11th Edition, p. 134. *Cook* v. *Oakley* (1715 A.D.) 24 English Reports at p. 400. *Blackstone's* Commentaries, 3rd Edition (1768), Vol. 2, p. 502. The principle that marriage or the birth of a new heir constitutes such a change in the circumstances of the testator that a will is thereby revoked is common to many systems of law. *Gaius'* Institutes (*Poste's* 4th Edition 1904, p. 199) and elsewhere. The matter has already been in effect decided in *Re Shaik Abubaker bin Mohamed Lajam deceased* [1935] M.L.J. 137. That was an Arab case but the principle is equally applicable in the Chinese case. Although the learned Chief Justice the Chinese case. Although the learned Chief Justice stated that this provision is one peculiar to English law, that is not correct, as his attention had not been drawn to similar provisions in Roman law and other systems of law. Evidence of a ceremony may not be conclusive but is strong evidence of the intention of parties to conclude a permanent union. A Chinese marriage will be inferred from cohabitation and repute. Family recognition is not an essential point though it is of course very good evidence of repute.

Koek for the defendant on the issues.

A secondary marriage is a sacrament in the life of a Chinese though the means of creating this relationship are looser than in Christian country. The law of the Colony enables a secondary marriage to be effected either with or without ceremonies but if with ceremonies there are certain recognised forms, judicially defined and these must be followed. The repute must be a repute of some definite body of neighbours and must be repute of the status of wife. *Ma Wan Di* v. *Ma Kim* (35 Calcutta 232). Evidence of recognition may be necessary as setting the seal of respectability on the union. As to revocation the Court will construe section 13 of the Wills Ordinance reasonably and workably. This section applies to a marriage which can be proved to have taken place at a certain date. Any other construction would be unworkable. When a marriage depends upon long continued co-habitation it is impossible to say whether such marriage took place before or after the date of the will. In *Shaik Abubaker bin Mohamed Lajam, deceased's* case the marriage took place on a certain date.

Laycock in reply.

I repeat my argument in the *Lee Pang Seng's* case. Recognition by the husband's family is strong evidence of repute but is no more. There have been cases where the husband refused to admit the marriage or where the family has refused recognition. *Woon Kai Chiang* v. *Yeo Pak Yee & ors.*, [1926] S.S.L.R., C.A., pp. 41 and 42 *per* Brown J. approved by Macabe Reay J., *Cheang Thye Phin* v. *Tan Ah Loy & ors.*, 14 S.S.L.R., C.A., p. 85; *Goodman* v. *Goodman*, 28 L.J. Ch. p. 745; *Collins* v. *Bishop*, 48 L.J. Ch. p. 31; *Lyle* v. *Ellwood*, L.R. 19 Eq. at p. 106; *Elliot* v. *Totnes Union*, 9 T.L.R. p. 468; *In re Haynes*, 94 T.L.R. p. 441. Repute does not need to be repute in the family and can be divided repute. Contrary statements by the husband are no more than evidence. Irregularity in the ceremony is of no importance. *Eversley's* Law of Domestic Relations, 4th Ed., pp. 5 and 6. *Halsbury* (*Hailsham*), Vol. 16, p. 598 and cases there cited. It has been clearly laid down in England that in the case of a marriage presumed from cohabitation and repute "you must infer the consent as having been givn at the first moment when you find the parties able to enter into the contract." *Campbell* v. *Campbell*, L.R. 1 Sc. App. at p. 213. *Re Haynes, supra.*

Cur. Adv. Vult.

Mills J.: The issues to be tried are —

(1) Whether Koh Gek Tiang is a lawful widow of Lee Kim Chye, deceased.

(2) Whether Koh Gek Tiang was the lawful wife of the said Lee Kim Chye subsequent to the making of his will dated the 15th day of March, 1923.

(3) Whether the said will dated the 15th day of March, 1923, was thereby revoked.

Imprimis, I note that several of the witnesses are financially interested in the result of this case: I therefore direct myself to approach their evidence in a critical spirit but at the same time to guard against rejecting their statements merely on the ground that they are interested.

The first point for determination is whether the facts raise a presumption of marrige between Lee Kim Chye and Koh Gek Tiang.

Counsel for Koh Gek Tiang (whom I will call "the plaintiff") bases her claim on the following grounds.

(1) Lee Kim Chye and the plaintiff went through a form of marriage ceremony:

(2) (a) Lee Kim Chye co-habited with the plaintiff;

[62] [62] (b) Lee Kim Chye intended their relationship to be permanent;

(c) Lee Kim Chye and the plaintiff were reputed to be husband and wife.

Excluding a clerk from the Treasury, the plaintiff calls four witnesses in support of her claim.

These are:—herself
a woman named Gan Kim Bee
a woman named Chu Swee Lan and
one Teo Ching An.

I was favourably impressed by the demeanour of the plaintiff: — I thought she gave her evidence in a frank and straightforward manner, without being unduly assertive. I accept her as a reliable witness.

I feel that if she were the sole witness for the prosecution in a criminal proceeding, I should be justified in convicting on her uncorroborated evidence.

On Gan Kim Bee I feel I can place no reliance at all, since she concocted a plausible explanation for a certain action of the part of a man who was afterwards proved to have been dead at the material time.

Chu Swee Lan, I thought, was an honest witness, but I warn myself against paying too much weight to her evidence in view of the fact that she is ignorant and uneducated.

Teo Ching An I regard as both honest and reliable. The evidence in support of the plaintiff's claim consists of the statements made by the four abovementioned witnesses, together with certain admissions made by the witnesses called on behalf of Chan Siew Neo (whom I will call "the defendant"). As regards the alleged marriage ceremony, I accept the testimony of the plaintiff.

It amounts to this: — The plaintiff's father arranged for her to marry Lee Kim Chye, his friend: her parents consulted her about the proposal: she agreed, and a date the 9th November, 1925 was fixed for the marriage.

On that day, the plaintiff, her mother and Gan Kim Bee went to the Chinese temple in Telok Ayer Street in the motor car of Lee Kim Chye, which he had sent for them.

Lee Kim Chye was waiting outside the temple for them.

They went into the temple.

Lee Kim Chye lighted a pair of ornamental candles and placed them before the Goddess Ma Cho.

Lee Kim Chye also lighted six joss-sticks, he held three and handed the other three to the plaintiff.

Lee Kim Chye and the plaintiff worshipped and prayed together. Later they went outside the temple where crackers were fired, then Lee Kim Chye and the plaintiff's party returned in the same car to the house of the plaintiff's mother. Counsel for the defendant belittled the significance of this ceremony: he stressed the fact that Lee Kim Chye had deliberately refrained from procuring the performance of the usual ceremony, of which the principal features are that the prospective secondary wife does obeisance to the "ts'ai" (principal wife) and offers tea to the "ts'ai" and the relations.

Counsel urged the Court to find that Lee Kim Chye deliberately withheld from the plaintiff the cachet of respectability. My views are as follows:—

(a) There is no evidence that any greater respectability is acquired by the secondary wife through the performance of the "usual ceremony," or that any less respectability attaches to her when she is married without the "usual ceremony": the Court cannot entertain this argument about respectability.

(b) As the "ts'ai" of Lee Kim Chye was dead, it was impossible for the plaintiff to perform the "usual ceremony" that is, to do obeisance to her or to offer her tea: there is no evidence that it is a part of the "usual ceremony" for a secondary wife such as the plaintiff to do obeisance to a secondary wife such as the defendant: I believe the plaintiff when she says that she offered tea to the defendant: that is, she performed one of the three acts which, if the "ts'ai" had been alive, would constitute the "usual ceremony."

(c) As it was impossible to perform the "usual ceremony" it is not justifiable to affirm that Lee Kim Chye deliberately refrained from procuring its performance: nor do I think that the Court is justified in concluding that if his "ts'ai" had been alive, he would have deliberately refrained from procuring its performance: that would, or at any rate might depend on the personality of the "ts'ai" and the Court ought not to guess what Lee Kim Chye might have done under different circumstances.

(d) I consider the Court ought to attach very great importance to this ceremony, for three reasons:

First, because Lee Kim Chye himself took the chief part in it, whereas the husband is not present at the "usual ceremony."

Secondly, because in my opinion it was clearly intended by Lee Kim Chye to be a ceremony of marriage, whereas the usual ceremony is not a ceremony of marriage.

Thirdly, because in my opinion it was clearly intended by Lee Kim Chye to have a religious significance, whereas the "usual ceremony" has no religious significance.

[63] Counsel for the defendant stressed that in [63] the eyes of the Chinese a marriage with a secondary wife is a sacrament: I must admit that, during 24 years of study and observation of Chinese customs, I have never before heard this proposition; I cannot accept it because there is no evidence of it nor can I take judicial notice of it, but, assuming it is correct I think the inference which the Court ought to draw in the present case is that Lee Kim Chye deliberately emphasised the sacramental nature of the rite by going out of his way to take the chief part in a religious ceremony of marriage instead of having recourse to the "usual ceremony" which has no religious significance, and is not a ceremony of marriage.

As to Lee Kim Chye's intention on the occasion of the ceremony it seems to me impossible for the Court to come to any other conclusion than that Lee Kim Chye intended to take the plaintiff as his wife: the evidence is as follows. After the ceremony, on the same evening a wedding feast was held at a house which Lee Kim Chye said was his house: in this house lived the plaintiff and her father and mother. Lee Kim Chye told Teo Ching An that he was marrying the plaintiff: the feast was attended by some 30 people, friends of Lee Kim Chye and of the plaintiff's father, including several women; after the dinner, some of the male guests were invited upstairs and see the bride in the usual way: the bride (the plaintiff) gave each such guest a cup of brandy: I find, then, that Lee Kim Chye and the plaintiff went through a form of marriage ceremony, and that, when doing so, Lee Kim Chye intended to take the plaintiff as a wife. This is sufficient to raise a presumption of marriage. In addition to Dr. Tyau, the Consul-General for China, who gives evidence as to Chinese law and customs only, the defendant calls five witnesses.

I regard Khoo Teng Leong as honest and reliable: he is an independent witness.

I regard Lee Toon Neo, a daughter of Lee Kim Chye as honest and reliable on the whole: making allowances for forgetfulness and difference of opinion. I see no inexplicable conflict between her evidence and that of the plaintiff: but if there is such a conflict, I prefer the plaintiff.

I do not feel I can place any reliance on the defendant: I was unfavourably impressed by her furtive demeanour, and some of her evidence was deliberately false or given regardless of whether it was true or not, for instance, she is quite decisive that when the plaintiff addressed her she never replied yet later in her evidence she states that when the plaintiff said she wanted to return home, she told the plaintiff not to come back again.

I cannot rely on the evidence Tan Sin Wah, another secondary wife of Lee Kim Chye: it seems to me impossible that she should not know and should not enquire whose child it was that the plaintiff took to the family house: further Lee Toon Neo whom I believe, states that Tan Sin Wah must have heard Lee Kim Chye say that the children were his. I cannot rely on the evidence of Lee Chuan Ching, aged 15 years: possibly he may not remember things that happened five years ago, but I do not believe him when he says he has never seen the plaintiff, and I do not believe him when he says, — contradicting the plaintiff whom I believe — that he never went to the plaintiff's house.

I now turn to the matters of cohabitation and repute. As to long-continued cohabitation, I need not detail the evidence; it is amply established that Lee Kim Chye cohabited with the plaintiff from 1925 until he died on the 9th May, 1930, and that he was the father of her three children. As to his intention to form a permanent union, the evidence is as follows:

Lee Kim Chye described as his own house the house in which the plaintiff lived with her mother and father: he paid the rent when he and the plaintiff moved to another house shortly after the marriage: he bought furniture for her and later asked her to take it with her when she returned to her former house: he paid the wages of her servant or servants: he told his friend, Teo Ching An after office hours to look for him first of all at the plaintiff's house and stayed the night two or three times a week: he always called the plaintiff his wife: he had three children by the plaintiff he himself reported their births and registered his name as their father: he sometimes took the children out: he told his family that he was the father of the plaintiff's children and on his death-bed he wanted to take one of them in his arms.

As there is no evidence that his affection for, or his attention to, the plaintiff suffered any diminution before the day of his death, in my opinion the Court must conclude that Lee Kim Chye intended to form a permanent union with the plaintiff, and I find accordingly.

As to repute: there is the evidence of Teo Ching An and Chu Swee Lan.

The former is the friend of Lee Kim Chye who attended the feast on the evening of the marriage ceremony: the feast was held at the house where the plaintiff lived with her father and mother: her father was presumably at one time a man of some substance as he had two wives and two houses, a large house in Amoy Street and a small one in Sungei Road: the plaintiff's brothers among other friends and relations, including some women, attended the feast: some thirty guests were invited.

Teo Ching An who had attended many wedding feasts states clearly that this was a wedding feast and that the plaintiff was the bride, it seems to me a proper inference that this [64] was not a hole-and-corner affair got up by a handful of disreputable folk, but a banquet of appreciable proportions publicly demonstrating in reputable manner that the plaintiff was being taken as a bride. [64]

If Teo Ching An considered that Lee Kim Chye was taking the plaintiff as his wife, I think the Court ought to conclude that the other 30 odd people considered the same: and if that is so, these people are enough to constitute the "body of neighbours" referred to in the case of *Ma Wun Di* v. *Ma Kim*, (35 Calcutta p. 232). Chu Swee Lan is the servant who was employed by the plaintiff to look after her children; she states that before she was employed by the plaintiff, the people in her house, next door to that of the plaintiff knew Lee Kim Chye as the plaintiff's husband: it is true that she first knew Lee Kim Chye as the plaintiff's husband when she was employed by the plaintiff, but that does not affect the estimation of the other people in the house regarding the relationship between Lee Kim Chye and the plaintiff.

I do not attach much weight to this evidence of repute, but I do not think it would be right to ignore it, and I must therefore hold that it adds something to the repute which I infer from the evidence of Teo Ching An.

I find as a fact, therefore, that Lee Kim Chye cohabited with the plaintiff, that he intended their relationship to be permanent, and that he and the plaintiff were reputed to be man and wife.

This is sufficient to raise a presumption of marriage. Moreover it stands to reason that this presumption is fortified by the presumption arising from the marriage ceremony, and each presumption is made stronger than if either stood alone. Once the presumption of marriage is raised it can be rebutted only by evidence which is strong, distinct and satisfactory. What is that evidence? Clearly I must rule out as irrelevant any evidence which refers to a point of time after the death of Lee Kim Chye since such evidence cannot have any bearing on ceremony, intention, cohabitation or repute.

The relevant evidence is as follows:—

A. Lee Kim Chye told certain members of his family that the plaintiff was only a kept mistress.

While I believe the plaintiff when she says that this did not occur in her presence, I believe Lee Toon Neo when she says that Lee Kim Chye made this statement. This disavowal of the plaintiff is not surprising: in fact, it is only in accordance with Lee Kim Chye's deliberate and consistent policy of keeping from his family the knowledge that he was going to take, and that he had taken, the plaintiff as his wife.

B. Khoo Teng Leong, a close friend of Lee Kim Chye, who often went to the house where the plaintiff lived, regarded the plaintiff as a kept mistress, although Lee Kim Chye never told him definitely what their relationship was.

I believe Khoo Teng Leong, and I have little doubt that as he was a friend of Lee Kim Chye's family, the latter deliberately led him to think that the plaintiff was only a kept mistress.

C. Members of Lee Kim Chye's family did not unequivocally recognise the plaintiff as being, or after his death as having been, the wife of Lee Kim Chye.

The evidence on this point is contradictory.

On the one hand stress is laid on the facts—

(1) that the plaintiff was allowed to stay nearly two weeks and her children several days in the family house just before and after the death of Lee Kim Chye;

(2) that the children were treated like other children;

(3) that the plaintiff was with the other mourners just as if she was a member of the family;

(4) that at the funeral the plaintiff went through the same ceremonies as the defendant;

(5) that the children wore sack cloth;

(6) that at one part of the ceremonies the plaintiff's son carried a bamboo stick;

(7) that the names of the plaintiff's sons appeared in the newspaper notices of Lee Kim Chye's death;

(8) that in subsequent correspondence the status of the plaintiff as a wife is not denied;

(9) generally, members of the family treated the plaintiff as a wife.

On the other hand stress is laid on the facts—

(1) at the funeral the plaintiff, without protest, wore a dress of unbleached calico whereas it is usual for a wife to wear a dress of sack-cloth;

(2) the names of the plaintiff's children do not appear on the tombstone of Lee Kim Chye;

(3) generally, the members of the family did not treat the plaintiff as a wife.

Without very detailed evidence of custom which I have not got, I cannot estimate the exact weight to be attached to each of these factors in order to determine whether the plaintiff was treated as a wife or not.

I think the fair conclusion is that she was not unequivocally recognised as a wife. The [65] members of the family would naturally take their cue from Lee Kim Chye, so it seems to me that the evidence under headings A, B and C amounts only to this, that Lee Kim Chye deliberately and consistently represented to his family and to a close friend that the plaintiff was not his wife. The Court now has to estimate the cogency of that representation, and to decide whether it amounts to such strong distinct and satisfactory evidence as will rebut the presumption of marriage, founded as it is on a two-fold basis.

The representation is strong in the sense that it is emphatic, it is distinct in the sense that it is unambiguous, but in my opinion a jury would consider it extremely unsatisfactory: for it is the representation of a man who had for five years been making a contrary representation: not only did Lee Kim Chye clearly demonstrate by the religious ceremony of marriage and by the wedding feast that he intended to take the plaintiff as his wife, but he said so in unmistakable words, as witness the evidence of Teo Ching An, "told me he was marrying the plaintiff," and "always mentioned her as his wife": no doubt Lee Kim Chye intended the plaintiff to regard herself as his wife and no doubt she did so regard herself. I have little doubt that a jury would consider Lee Kim Chye's contra-representation to be evidence, not of truthfulness but of moral cowardice.

My conclusion is that the presumption of marriage between Lee Kim Chye and the plaintiff is not rebutted.

I hold that the plaintiff became the lawful wife of Lee Kim Chye on the 9th day of November, 1925.

In deciding that marriage may be presumed from cohabitation and repute, I merely follow several decisions given by the Court of Appeal: for instance, the case of *Woon Kai Chiang* v. *Yeo Pak Yee and others*, [1926] S.S.L.R., p. 27.

In the case of *Re Tay Geok Teat deceased, Sunny Tay* v. *Seow See Neo and another*, [1934] M.L.J. 85; [1934] S.S.L.R. 88 the learned trial Judge reviews certain authorities and extracts from them an indication that in cases such as the present there must be satisfactory evidence of the recognition of the marriage by members of the husband's family.

In the case of *Re Lee Choon Guan deceased, Lew Ah Lui* v. *Choa Eng Wan and others*, [1935] M.L.J. 78 the same learned Judge lays down the same proposition, and remarks that it must be presumed that this proposition of law was accepted by the Court of Appeal in *Sunny Tay's* case. I have read the authorities reviewed by the learned Judge, but I am unable to discover in them any indication that the Court intended to lay down this proposition of law: and as regards *Sunny Tay's* case I am in a position to say that this proposition of law not only was not apprved but was not raised and not considered.

In the present case counsel for the plaintiff contests this proposition of law and counsel for the defendant does not support it.

The proposition appears to me to be inconsistent with several decisions of the Court of Appeal: whatever justification the learned Judge may have had for declining to follow those decisions, I can find none in the present case, and I therefore feel bound by them. Consequently I hold that recognition of the marriage by members of the husband's family is not essential.

I now turn to consider whether the will made by Lee Kim Chye on the 15th day of March, 1923 was revoked by his marriage with the plaintiff on the 9th day of November, 1925.

In the case of *re Shaik Abubakar bin Mohamed Lajam, deceased,* [1935] M.L.J. 137 the learned Chief Justice in 1924 held that section 13 of Ordinance No. 13 (Wills), applies to marriages of Mohamedans: that is, that the operation of that section is not confined to monogamous marriages and that in the case of Mohamedans, a will is revoked by a polygamous marriage.

Counsel for the plaintiff states from the Bar that this decision has never been questioned and has frequently been acted upon during the last 11 years.

That decision does not bind me, but it is entitled to very great respect and I should feel that I ought to follow it unless I were convinced that it is incorrect: I am not convinced that it is incorrect.

But counsel for the defendant seeks to distinguish it: he argues that as section 13 of Ordinance No. 3 (Wills) is based on section 18 of the English Wills Act, 1837, it can only apply to a marriage which has this characteristic of an English marriage, that it can be dated; in other words, it can only apply to a marriage which can be proved to have taken place on a certain date; it cannot apply to a marriage presumed from cohabitation and repute, because such a marriage cannot be proved to have taken place on a certain date: if applicable at all, it must be applied to all Chinese secondary marriages, and if a Chinese makes a number of secondary marriages, none of which can be proved to have taken place on a definite date, the result of applying this section will be to create a situation which is unreasonable and unworkable; the Court ought to construe the law reasonably and workably, and that necessitates the decision that section 13 is not applicable to Chinese secondary marriages.

I find myself unable to accept that argument. Counsel has not given reasons to satisfy me that any characteristic of an English marriage is to be implied in the use of the word "marriage" in section 13: one of the most important characteristics, — if it is not the most important characteristic, — of an English marriage, namely, that it is monogamous, is not to be [66] implied in the use [66] of the word, and I can see no reason why a less important characteristic, namely that it can be dated, is to be implied: moreover, in England a marriage may be presumed from cohabitation and repute, and the Courts have laid down the principle on which the date is to be determined, namely, on the earliest date on which a marriage can be presumed (*cf. Re Haynes: Haynes* v. *Carter,* 94 *Law Times* Reports, p. 431): no doubt difficulties may arise when several secondary marriages are presumed from cohabitation and repute, but in practice it will nearly always be possible to frame the issue in such a way that the question will be whether the Court can presume the marriage to have taken place before a certain date, and that question can be determined in the same way as any other question of fact; if the issue cannot be so framed, for instance when there are several wills and several secondary marriages, and it is difficult to date any of them then if the Court cannot determine the dates, the litigant will fail who is liable to discharge the burden of proof. I do not say that this is satisfactory, but it does not create a situation which is unworkable: it is only when a statutory provision may equally well be construed in two ways, one reasonable and the other unreasonable, that the Court will adopt the construction that is reasonable: if a statutory provision is clear (and if I follow *Shaik Abubakar's* case, I must hold that "marriage" in section 13 clearly includes polygamous marriages), the question whether it is reasonable or not, does not fall within the purview of the Court. Accordingly, I hold that section 13 of Ordinance No. 3 (Wills) is applicable to a Chinese secondary marriage and consequently that the will made by Lee Kim Chye on the 15th day of March, 1923 was revoked by his marriage with the plaintiff on the 9th day of November, 1925. In my judgment, the issues set out at the commencement hereof are to be determined as follows:—

Issue (1): Yes.
Issue (2): Yes.
Issue (3): Yes.

Order ccordingly.

Solicitors: *Braddell Bros.; Chan & Eber.*

REX v. VINCENT BANKA & ANOR.

[C.C.A. (Huggard C.J., Whitley and Terrell JJ.) January 11, 1936]
[Criminal Appeal No. 5 of 1935]

Penal Code, s.34 — Common intention.

Before the jury can find an accused person guilty of murder by reason of the provisions of section 34 of the Penal Code, they must be satisfied on the evidence that there existed between the participants a common intention not only to rob but also to kill the deceased. The trial Judge should direct the jury to this effect.

The Emperor v. *Nga Aung Thein,* A.I.R. 1935 Rang. 89 and *Barendra Kumar Ghose* v. *The King-Emperor,* 52 I.A. 41 followed.

Appeal against conviction for murder. The appeal came on for hearing before Huggard C.J., Whitley and Terrell JJ. and at the conclusion of the hearing the Court reserved judgment.

Mallal for the 1st accused.

Davies for the 2nd accused.

Worley (Deputy Public Prosecutor) for the Crown.

The facts and arguments sufficiently appear from the judgment.

On the 11th of January 1936 the Court delivered an oral judgment allowing the appeal and quashing the conviction and intimated that they would give their reasons in writing later. The judgment of the Court was delivered by —

Huggard C.J.: The appellants were jointly charged at the November Assizes at Singapore with (1) murder, and (2) committing robbery in the course of which hurt was caused. They were convicted on both charges and were each sentenced to death in respect of the first charge and to seven years' rigorous imprisonment in respect of the second charge.